No. SC87564

IN THE MISSOURI SUPREME COURT

STATE EX REL. CHARLES MERTENS,

Relator,

v.

THE HONORABLE THOMAS J. BROWN III,

Respondent.

Original Proceeding in Prohibition

Respondent's Statement, Brief and Argument

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STATEMENT OF FACTS

Underlying this prohibition action are four separate cases: a Cole County criminal case, a habeas corpus proceeding in St. Francois County, a petition for writ of mandamus in the Missouri Court of Appeals, Eastern District, and a petition for prohibition in the Missouri Court of Appeals, Western District.

On August 8, 2004, relator Charles Mertens drank until he was intoxicated, drove a vehicle and killed a person and then left the scene of the collision.[1] He pled guilty to offenses arising from this conduct on February 7, 2005 in the Cole County Circuit Court[2] and Judge Brown deferred sentencing until May 2, 2005 in order to obtain and review the pre-sentence report.[3] On May 2, 2005, Judge Brown sentenced Mertens under §559.115[4] to five years imprisonment on the involuntary manslaughter count and to a concurrent four year sentence on leaving the scene of a motor vehicle accident count.[5] After reviewing the Department of Corrections

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[1]Relator's Exhibit B, page 1.

[2]Relator's Exhibit B.

[3]Relator's Exhibit B, page 1.

[4]RSMo Cum.Supp. 2005. All further statutory references are to the 2005 supplement.

[5]Relator's Exhibit B, page 3.

report on Mertens' progress in the short-term drug treatment program under §559.115, Judge Brown denied probation release on September 9, 2005, without holding a hearing.[6]

On October 27, 2005 Mertens filed a petition for writ of habeas corpus in the Circuit Court of St. Francois County.[7] At the conclusion of the hearing on December 22, 2005, the court granted a conditional writ of habeas corpus ordering that Mertens be released if Judge Brown did not hold a hearing in order to decide whether Mertens should be released on probation.[8] The State did not file a petition for certiorari review in the Missouri Court of Appeals or this Court. Mertens then filed a petition for writ of mandamus in the Missouri Court of Appeals, Eastern District, asking that court to order the St. Francois County Circuit Court to release Mertens outright.[9] The Court of Appeals denied this petition.[10]

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[6]Relator's Exhibit E, page 1; Relator's Exhibit D, page 4.

[7]Relator's Exhibit F.

[8]Relator's Exhibit A.

[9]*State ex rel. Charles A. Mertens v. Hon. James A. Kelly*, No. ED87460 (Mo.App. E.D., filed Jan. 9, 2006).

[10]Relator's Ex. H.

Judge Brown scheduled a probation release hearing for Mertens on January 11, 2006, in compliance with the St. Francois County Circuit Court's order.[11] Prior to that hearing date, Mertens filed a petition for writ of prohibition in Missouri Court of Appeals, Western District, which entered a "stop order" prohibiting Judge Brown from holding the hearing at that time.[12] After Judge Brown filed suggestions in opposition to the petition, the Court of Appeals denied Mertens' petition.[13] The St. Francois County writ is stayed pending the resolution of this case and any other extraordinary writ cases that may arise.[14]

[11]Pet. at ¶10.

[12]Relator's Exhibit F.

[13]Relator's Exhibit G.

[14]Respondent's Exhibit 1.

ARGUMENT

Judge Brown has jurisdiction to hold a hearing in order to decide whether relator Mertens should be release on probation under §559.115

Prohibition is an available remedy:

> 1) where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; 2) where there exists a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated; or 3) where there is no adequate remedy by appeal.[15]

In this case, relator Mertens alleges that Judge Brown lacks jurisdiction to hold a hearing as required by the St. Francois County Circuit Court. Mertens' arguments lack merit.

A. Judge Brown has inherent jurisdiction to proceed

The Cole County Circuit Court has jurisdiction in this case to correct a procedural error. Mertens does not allege or demonstrate that the Cole County Circuit Court failed to resolve the probation issue within the 120 days allotted by

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[15] *State ex rel. Director of Revenue v. Mobley*, 49 S.W.3d 178, 179 (Mo. banc 2001).

§559.115.3.[16] Indeed, to the contrary, Mertens admits that the Cole County Circuit Court acted within the 120 days in initially denying him probation.[17] As the St. Francois County Circuit Court held, the only error in the probation denial was a procedural error: Judge Brown did not hold a hearing as required by §559.115. Judge Brown has jurisdiction to correct this procedural error and to give Mertens a full and fair opportunity to receive probation. Judge Brown also has the responsibility to maintain society's interest that potentially dangerous offenders, as well as offenders who would benefit from institutional programs in the Department of Corrections, are not released on probation. Society's interest is particularly acute in this case, in which Mertens killed another person while driving drunk in Cole County, because of the potential for recidivism.

B. The St. Francois County court's conditional writ allows Judge Brown to correct the procedural error

The Cole County Circuit Court's jurisdiction is buttressed by the St. Francois County Circuit Court's issuance of a conditional writ of habeas corpus. This order allowed Judge Brown to take the measures necessary to protect Mertens' statutory rights under §559.115. Missouri courts sitting in habeas corpus

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[16]§559.115, RSMo Cum.Supp. 2003.

[17]Relator's Exhibit F, ¶7; Petition, ¶8.

have consistently allowed trial courts to correct procedural errors such as the one in this case. For example, in *State ex rel. Nixon v. Dierker*,[18] the Circuit Court of St. Louis City issued a writ of habeas corpus when a defendant had not received the amount of jail time credit contemplated by his plea agreement.[19] The St. Louis City Circuit Court remanded the case to the trial court in St. Louis County for resentencing.[20] The Eastern District affirmed the habeas court's actions, holding that the habeas court properly crafted a remedy that protected the defendant's rights.[21]

Similarly, in *State ex rel. Hahn v. Stubblefield*,[22] the defendant contended that he received ineffective assistance of counsel because counsel did not file a timely notice of appeal.[23] The court of appeals concluded that the offender's constitutional rights had been violated and that "appropriate relief can be accorded petitioner short of an outright discharge."[24] The court of appeals remanded the

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[18]*State ex rel. Nixon v. Dierker*, 22 S.W.3d 787 (Mo. App. E.D. 2005).

[19]22 S.W.3d at 789.

[20]*Id*.

[21]22 S.W.3d at 791.

[22]*State ex rel. Hahn v. Stubblefield*, 996 S.W.2d 103 (Mo. App. E.D. 1999).

[23]996 S.W.2d at 104.

[24]*Id*. at 108.

cause with direction to vacate and set aside the sentence, then resentence the offender so that he would be able to file a timely notice of appeal.[25]

In both of those cases, the habeas courts found procedural irregularities. In order to correct the procedural flaws, the courts sent the cases back to the sentencing court to take the necessary action. Thus, the habeas courts invested the sentencing courts with power to correct the procedural flaws associated with the conviction and sentence. Even assuming that Judge Brown lacked jurisdiction to hold the hearing *sua sponte*, the habeas court's order and conditional writ gave Judge Brown the limited jurisdiction he needed to correct the procedural error. Without the existence of one of these two forms of jurisdiction (inherent or granted), conditional writs of habeas corpus would not work. Without conditional writs, courts would be left with only two options when confronted with an irregularity in a criminal proceeding: releasing the offender outright without consideration of any possible danger or continuing to confine the offender notwithstanding the error. Neither of these options strike the proper balance between the offender's rights and society's interests.

The St. Francois County Circuit Court's writ, as well as Judge Brown's decision to hold a hearing, will protect Mertens' statutory rights as well as the

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[25]*Id*. at 109.

public interest. Release on probation is not mandated under §559.115; the sentencing judge has discretion to deny probation based on the report that the Department of Corrections submits to him. Permitting Judge Brown to conduct the hearing will allow him to decide, using the proper procedures, whether Mertens should be released. Mertens will have the full opportunity at the hearing to argue that he should be released, the opportunity to present evidence in favor of his release, and the opportunity to counter any evidence opposing release.

Releasing Mertens without a hearing, as this Court's grant of a permanent writ of prohibition would aid in doing, would grant him a windfall; he would be released on probation without giving Judge Brown, or any other judge, for that matter, the opportunity to determine his suitability for release after a hearing. Releasing Mertens without a hearing based on a mere procedural omission would be extremely poor policy because it would turn probation proceedings under §559.115 into a game. Defendants would search for any and all procedural flaws in a judge's decision to deny them probation as those flaws would grant them automatic release.

This outcome is unworkable in practice and significantly downplays, if not ignores, society's interest in screening candidates for probation. The better solution is to remand the cases to the sentencing court to allow the sentencing

judge to correct the procedural errors and use his discretion to decide whether or not probation release is justified.

This line of reasoning leads to another possible solution based on the results in *Dierker* and *Hahn*, as well as this Court's decision in *State ex rel. Meier v. Stubblefield*:[26] this Court could treat the petition for a writ of prohibition as a petition for writ of habeas corpus, vacate the sentence, and remand the case for resentencing. Judge Brown then would enter the same sentence previously imposed under §559.115. The 120-day period would then restart, and Judge Brown could immediately hold the hearing without any question about his jurisdiction. This solution would respect both Mertens' right to a hearing under §559.115 and society's interest in judicial examination and screening of candidates for probation. While respondent does not waive any of the other arguments presented, this solution would lead to the same result that the St. Francois County Circuit Court intended and which the State does not oppose. This solution would grant Mertens a reasonably prompt hearing, would safeguard society's interest in a hearing and judicial screening of possible probationers, and would eliminate any jurisdictional issues raised by the application of the St. Francois County writ to

[26]*State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476, 477 (Mo. banc 2003).

Mertens after he was transferred to the Algoa Correctional Center in Jefferson City.[27]

C. A hearing is necessary to provide a record for review

Mertens contends that any hearing would be unnecessary because Judge Brown cannot deny him probation. Mertens bases his claim on this Court's decision in *State ex rel. Beggs v. Dormire*.[28] He cites *Beggs* for the proposition that no evidence supports the denial of probation.[29]

Beggs is not applicable here because it looked at the evidence adduced **after** a hearing on release had taken place.[30] In that case, the State had the opportunity to present evidence regarding Beggs' placement on probation and did not. This case is different because there has not been a hearing. Holding the State responsible for not producing evidence when the State had no opportunity to do so is fundamentally unfair; it is analogous to a court barring a criminal defendant's

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[27]Mertens was transferred to Algoa on April 27, 2006.

[28]*State ex rel. Beggs v. Dormire*, 91 S.W.3d 605 (Mo. banc 2002).

[29]Realtor's Brief at 12-13.

[30]91 S.W.3d at 606-07. The offender in *Beggs* was sentenced under §217.362, RSMo 2000, which is near-identical to the current version of §559.115.3 as it relates to a trial court's review of release on probation.

evidence on the prosecutor's motion and then allowing the prosecutor to argue that the defendant should have presented evidence and that none exists. The Court of Appeals in *State v. Weiss* granted relief on this type of claim, holding that it created a "manifest injustice."[31]

A manifest injustice would also occur in this case if the State, which was not responsible for the lack of a hearing, is held responsible for not producing evidence at a hearing. A hearing is necessary to provide a complete picture of Mertens' participation in the Department of Correction program under §559.115, especially considering the circumstances of this case, in which Mertens killed a person in Cole County while driving drunk. Mertens' release on probation deserves full review and a full hearing.[32] This Court should ensure that he receives such a hearing prior to any release on probation.

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[31]*State v. Weiss*, 24 S.W.3d 198, 203-04 (Mo.App. W.D. 2000).

[32]Mertens may, like the relator in *Beggs*, challenge the trial court's denial of probation after a hearing by the appropriate writ if the trial court denies probation.

CONCLUSION

For these reasons, respondent prays that this Court quash its preliminary writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software, that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free, and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of June, 2006.

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RESPONDENT'S APPENDIX

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